

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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|--------------------------------------|---|---------------------|
| In the Matter of |) | |
| Federal-State Joint Board |) | |
| On Universal Service |) | CC Docket No. 96-45 |
| |) | |
| RCC Holdings, Inc. |) | |
| Petition for Designation as an |) | |
| Eligible Telecommunications Carrier |) | |
| Throughout its Licensed Service Area |) | |
| In the State of Alabama |) | |
| |) | |
| and |) | |
| |) | |
| Cellular South License, Inc. |) | |
| Petition for Designation as an |) | |
| Eligible Telecommunications Carrier |) | |
| Throughout its Licensed Service Area |) | |
| In the State of Alabama |) | |
| _____ |) | |

REPLY COMMENTS OF GVNW CONSULTING, INC.

Introduction and Background

GVNW Consulting, Inc. (GVNW) is a management consulting firm that provides a wide variety of consulting services, including regulatory support on issues such as universal service, advanced services, and access charge reform for communications carriers in rural America. The purpose of these reply comments is to respond to the Public Notice (DA 03-45) requesting comments on the application for review of orders designating RCC Holdings, Inc. (RCC) and Cellular South License, Inc. (Cellular South) as eligible telecommunications carriers (ETCs) in Alabama. We are pleased that the Commission has requested comments and replies on this issue of designating ETCs in rural carrier service areas.

Summary of Reply Comments

The fact is that Congress indicated its clear intent that a separate standard should apply for the designation of additional ETCs in rural carrier service areas. Both the evidence in the public record of CC Docket No. 96-45, as well as a recent appellate court decision supports this congressional intent. Congress intended for different rules to apply to the decision of whether to designate more than one ETC in a rural service area, which is not how the instant cases were handled.

The proliferation of multiple ETCs in rural areas, and the detrimental impact of this trend on the future stability of high-cost support, have become issues of national significance, making the errors in the Alabama ETC Decisions all the more vital to reconsider and correct. The public interest demands that regulators carefully consider whether a market can support more than one carrier with universal service.

Throughout the debate over the last seven years as to what Congress meant to happen with the implementation of the Telecommunications Act of 1996 (TA 96), parties have looked to what key legislators stated during the debate on this industry-defining legislation. The need to protect and advance universal service was one of the “fundamental concerns of the conferees in drafting this conference agreement.” It seems fairly evident that if the Commission decides to grant authority to more than one ETC in a rural area, it should only be after a public interest test is applied and it is clearly determined that the benefits exceed the costs. Simply stated, Congress did not intend for this nations’ rural areas to be sacrificed on the altar of competition.

CONGRESSIONAL INTENT WITH RESPECT TO RURAL SERVICE AREAS IS CLEAR

The comments filed on the Application for Review of the Wireline Competition Bureau decisions highlight some of the confusion¹ that exists today with respect to designating multiple carriers in rural carrier service areas. However, the fact is that Congress indicated its clear intent that a separate standard² should apply for the designation of additional ETCs in rural carrier service areas. Both the evidence in the public record of CC Docket No. 96-45, as well as a recent appellate court decision supports this legislative mandate.

During the Rural Task Force deliberations³, the RTF reached nine conclusions with respect to the rural difference issue. These differences were referenced in the Commission's Rural Access Reform Order that was released on November 8, 2001 (MAG Order (FCC 01-304)). In paragraph 4 of this Rural Access Reform Order, the Commission references these rural differences in footnote 9.⁴ This issue is relevant to making a determination of whether the public interest test is met with respect to certifying an additional ETC in a rural service area.

¹ "There is currently a great deal of confusion surrounding both the level of information and the process needed to designate an additional ETC in a rural area already served by an existing ETC." (Northwest Commenters, page 1)

² Upon request and consistent with the public interest, convenience, and necessity, the State commission **may**, in the case of an area served by a rural telephone company, and **shall**, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation **is in the public interest**. 47 U.S.C. § 214(e)(2) (emphasis added).

³ The RTF demonstrated empirically that the rural carriers have different characteristics from urban carriers. The nature and scope of these significant differences within the subset of rural carrier markets has been placed in the public record by the RTF via its White Paper 2, entitled The Rural Difference, released in January, 2000. This second of five White Papers offered a very detailed empirical analysis of the major rural carrier differences.

⁴ *"They also rely more heavily on revenues from interstate access charges and universal service support."*

A recent appellate court decision also serves to support legislative intent with regard to recognizing a distinction between rural and non-rural service areas. In the *Iowa Utilities Board v. FCC* case heard by the Eighth Circuit Court of Appeals, the findings of the Court included the following relevant passage:

There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in [the statute]. Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily-granted exemption from doing so should continue unless the state commission found all three prerequisites for terminating the exemption, or determined that all prerequisites for suspension or modification were met in order to grant an ILEC affirmative relief.⁵

In short, Congress intended for different rules to apply to the decision of whether to designate more than one ETC in a rural service area. We agree with the statement of the Alaska Telephone Association, found at page 16 of their comments⁶.

THE DUAL GOALS OF UNIVERSAL SERVICE AND COMPETITION REQUIRE A DELICATE BALANCE

The past seven years have provided a test of regulators' ability to balance the tension of the two foundational goals of TA 96, universal service and competition. Comments that capture some of the lessons learned for rural areas are found in the comments of two current FCC commissioners.

⁵ *Iowa Utilities Board v. FCC*, 219 F.3d at 761-763.

⁶ The Wireline Competition Bureau erred in its Alabama ETC Decisions by (i) granting designation in spite of a pending Joint Board review on the very rules that underlie an ETC determination, and (ii) misapplying (largely through neglect) the public interest inquiry required for ETC designation under § 214(e). The proliferation of multiple ETCs in rural areas, and the detrimental impact of this trend on the future stability of high-cost support, have become issues of national significance, making the errors in the Alabama ETC Decisions all the more vital to reconsider and correct.

In his oft-quoted dissent in the Rural Access Reform Order⁷, Commissioner Martin succinctly captures the issue in the following:

I also note that I have some concerns with the Commission's policy – adopted long before this Order - of using universal support as a means of creating "competition" in high cost areas. I am hesitant to subsidize multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier. This policy may make it difficult for any one carrier to achieve the economies of scale necessary to serve all of the customers in a rural area, leading to inefficient and/or stranded investment and a ballooning universal service fund. It is thus with real pause that I sign on to an Order that may further this policy. I will continue to examine these issues as well as the other concerns raised regarding the impact that our policies may have on rural America.

This statement stands in stark contrast to the apparent underpinning of the Bureau's decisions in the instant matter that an additional rural ETC creates "beneficial" competition.

Commissioner Jonathan Adelstein addressed the concerns of a ballooning universal service fund and the need to **balance** competition against the public good, stating in part⁸:

"The public interest also demands that regulators seriously consider whether a market can support more than one carrier with universal service. If not, then new designations shouldn't be given as a matter of course just because it appears they meet other qualifications."

It is not evident in the decisions that the Wireless Competition Bureau rendered in this instant matter that such a determination was made.

⁷ Separate Statement of Commissioner Kevin J. Martin in *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 16 FCC Rcd 19613 (2001).

⁸ Commissioner Adelstein, "Rural America and the Promise of Tomorrow," NTCA Annual Meeting & Expo, Phoenix, Arizona (remarks delivered on February 3, 2003).

FOR RURAL SERVICE AREAS, THE BENEFITS MUST EXCEED THE COSTS IF A DESIGNATION OF MORE THAN ONE ETC IN A RURAL SERVICE AREA IS TO BE MADE

Throughout the debate over the last seven years as to what Congress meant to happen with the implementation of TA 96, parties have looked to what key legislators stated during the debate on this industry-defining legislation.

Senator Byron Dorgan, who introduced the language that requires a public interest test before designating a second ETC in a rural area, stated⁹:

The protection of universal service is the most important provision in this legislation. S.652 contains provisions that make it clear that universal service must be maintained and that citizens in rural areas deserve the same benefits and access to high quality telecommunications services as everyone else. (emphasis added)

Senator Kerry of Massachusetts added: “The conference report also maintains universal service as a cornerstone of our Nation’s communications system.”¹⁰

Senator Hollings of South Carolina offered: “The need to protect and advance universal service is one of the fundamental concerns of the conferees in drafting this conference agreement.”¹¹

Given the unambiguous intent of these legislators, it seems fairly evident that if the Commission decides to grant authority to more than one ETC in a rural area, it should only be after a public interest test is applied and it is clearly determined that the benefits exceed the costs. We disagree with the statements offered by Dobson Communications (page 2) in their initial comments. Simply stated, Congress did not intend for this nations’ rural areas to be sacrificed on the altar of competition.

⁹ Congressional Record of June 8, 1995, S 7951-2.

¹⁰ 142 Cong. Rec. S687, S710.

¹¹ 142 Cong. Rec. S687, S688.

Summary and Recommendation

GVNW Consulting recommends the Commission overturn the decisions that the Wireline Competition Bureau made in granting ETC status to RCC Holdings and Cellular South. The Bureau failed to perform the necessary public interest test and the resulting decisions should be set aside unless and until such analysis has been performed.

Respectfully submitted,

electronically submitted 2/21/03 through ECFS

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